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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEVEN LOPEZ, Defendant and Appellant.	E071797 (Super.Ct.No. INF1600709) OPINION

APPEAL from the Superior Court of Riverside County. Anthony R. Villalobos, Judge. Affirmed with directions.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Steven Lopez, along with the victim and Salvador Meza were hanging out together in Meza's bedroom in a house in Indio. The victim and

defendant both were showing off handguns they had in their possession. Meza left defendant and the victim alone in the room and went to the kitchen to drink with some girls and another friend. Meza and the other people in the kitchen heard gunshots. They discovered the victim in the front yard bleeding. Meza observed defendant driving off on his motorcycle. The victim later died at the hospital.

Defendant was convicted of the second degree murder of the victim. (Pen. Code, § 187.)[1] In addition, the jury found true the special allegation that defendant personally used a firearm causing great bodily injury or death. (§ 12022.53, subd. (d).) Defendant was sentenced on December 5, 2018, to a total state prison sentence of 40 years to life.[2]

Defendant claims on appeal that (1) the trial court erred and violated his federal due process rights by admitting a statement made by one of the witnesses, Daniel Soto, to another witness on the night of the shooting, that he had seen defendant at the house where the shooting occurred, in order to attack Soto's credibility pursuant to Evidence Code section 1202; (2) the trial court gave conflicting instructions on the permissible use of Soto's statement to another witness in violation of defendant's federal constitutional due process rights requiring reversal of his conviction; (3) the trial court erred by instructing the jury with CALCRIM No. 315 that it could consider a witness's certainty in his or her identification in evaluating identification testimony;(4) cumulative errors that occurred at trial warrant reversal; (5) the trial court erred by refusing to reduce his

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Several fines and fees were also imposed, which we will set forth in detail, *post*.

conviction of personally using a firearm to a lesser firearm enhancement pursuant to Penal Code section 12022.53, subdivision (h); (6) defendant contends remand to the trial court is necessary for it to conduct an ability to pay hearing for the restitution fine and court operation fees imposed in light of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*); and (7) if this court does not remand under *Dueñas*, this court should order the restitution fine that was imposed by the trial court pursuant to Penal Code section 1202.4, subdivision (b), and the parole revocation fine imposed pursuant to Penal Code section 1202.45 be reduced from $1,000 to $300, the minimum fine.

FACTUAL AND PROCEDURAL HISTORY

A. THE SHOOTING

Meza was friends with defendant, Daniel Soto and the victim. On May 26, 2016, Meza rented a room in a house on Calle Zafiro in Indio. On that evening the victim and Soto both contacted Meza and said they wanted to come to his house to hang out. Soto wanted to bring some girls with him. After the victim arrived at Meza's house, he called defendant. Defendant arrived at Meza's house about 20 minutes later. Meza, the victim and defendant were all in Meza's bedroom.

Meza, the victim and defendant were all getting along and talking. The victim and defendant both had guns that they were showing off to each other. The gun possessed by defendant would have taken .40- or .45-caliber bullets. There was no tension between the victim and defendant. Soto showed up about 10 minutes later. Soto looked into the room when he arrived; Meza indicated defendant was still in the room. Meza went with Soto

to the kitchen. Defendant and the victim stayed in Meza's room. A few minutes later, Meza heard gunshots.

Meza saw the front door open and went outside. The victim was kneeling on the ground holding his stomach. The victim told Meza to take him to the hospital. At that point, Meza saw defendant get on his motorcycle and ride away. Defendant said nothing and did not try to help the victim. Defendant had on a black helmet. Meza went inside to get his keys and told Soto that the victim had been shot. Meza drove the victim to the hospital.

Meza indicated that defendant owned a green and black motorcycle. It was old and had a modified exhaust to make it loud. Meza did not actually see defendant shoot the victim. The victim never told Meza who had shot him.

On May 26, 2016, at around 10:00 p.m., the victim told Soto to meet him at Meza's house.[3] Soto brought four girls with him to the house in his car. When Soto arrived, the victim and Meza were in Meza's bedroom; he did not see defendant. Meza and Soto went to the kitchen to drink beer and smoke marijuana with the girls. The victim did not join them. At some point, Soto observed the victim walk out the front door. The victim was talking on the phone. Approximately one minute later, Soto heard gunshots. Soto went out to the front yard and saw the victim holding his stomach. Soto

[3] Soto refused to testify at trial. No immunity was given to Soto because he had pending criminal charges in another case. The trial court found him unavailable and agreed to allow the preliminary hearing testimony be read to the jury.

gathered the four girls and they left. Soto took the girls home and then went to the hospital.

Soto did not recall seeing a motorcycle at the house that night and claimed he did not know anyone who drove a black and green motorcycle. He knew defendant from high school but he was not a close friend. He had never seen defendant on a green motorcycle.

On May 26, 2016, at around 11:30 p.m., Darrian Wilford, Adriene Sanchez, Anesha Smith and Ashleigh Smith all went with Soto to Meza's house. The four girls hung out in the kitchen drinking beer and smoking marijuana with Soto and Meza. Meza left the kitchen several times.

While they were in the kitchen, Wilford, Ashleigh[4] and Sanchez heard gunshots. The gunshots were coming from outside. All of the girls hid in a closet thinking it was a drive-by shooting. Soto yelled to the girls that they had to leave. They all got in Soto's car and left. Meza had already left in his own car. Soto told them that the victim had been shot. Meza was not in the kitchen when they heard the gunshots. Sanchez did not see Meza or the victim when she left the house.

Sanchez thought she saw a three-wheel motorcycle in the driveway or at the neighbor's house when they arrived. Sanchez, Ashleigh and Wilford did not see anyone

[4] We use Ashleigh's first name as she shares a last name with her sister; no disrespect is intended.

else in the house besides Meza and Soto.[5] Ashleigh thought she saw a red or black motorcycle parked in the driveway when they arrived at the house. Wilford admitted she had seen a green and black motorcycle at the house. Wilford heard a motorcycle after the gunshots that appeared to be driving away from the residence. Wilford never saw defendant at the house. Ashleigh told the police later that Soto told her that defendant was at the house that night.

Becky Marx lived on Calle Zafiro in Indio on May 27, 2016, with her boyfriend Peter Ali. She was a trained paramedic and he was a former police officer. He had specialized in teaching officers how to ride motorcycles. Marx and Ali were outside their house around 12:30 a.m. with some of their neighbors when they heard gunshots. Marx walked to the end of the driveway and could see up the street into the yard of Meza's house. She saw somebody standing in front of the house holding a gun with both hands shooting toward the house. She saw the muzzle flashes. The shooter was not moving or running. Marx heard no one shouting or yelling.

The shooter got on a motorcycle that was parked in front of the house. Marx and Ali ran back up their driveway when the shooter on the motorcycle started coming down the street toward them. Ali described the sound of the motorcycle as loud and it looked like an old style motorcycle. It was dark in color, either black or dark green. Marx also indicted that the motorcycle was loud. Marx and Ali had heard a motorcycle earlier in the night around 11:00 or 11:30.

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[5] Sanchez knew defendant from school. Ashleigh denied that she knew defendant. Wilford knew defendant through his brother.

Marx and Ali walked down to Meza's house. They saw blood on the sidewalk, shell casings on the ground and a gun was on the lawn. The gun was not where the shooter was seen by Marx. Ali believed it was a .38-caliber gun. There was no shooting victim.

Ali did not recall describing the person on the motorcycle to the police as being 40 to 50 years old, white and not wearing a helmet; defendant did not meet this description. At trial, Ali believed the person on the motorcycle was wearing a helmet.

Daniel Franks rented the room in the house on Calle Zafiro to Meza. Franks was in the backyard on his phone when he heard "three pops" in the front yard. He then heard a motorcycle or dirt bike take off and then heard someone crying for help. Meza and the victim had already left by the time Franks got to the front of the house.

Charles Cash was the apartment manager at the apartment complex where defendant and his brother Alex Lopez lived. They both rode motorcycles. He saw defendant on May 26, 2016, at 2:30 p.m. riding an older model motorcycle that was green and black. The motorcycle was "super loud." A neighbor of Meza's heard a motorcycle leaving at around 12:30 a.m.

B. INVESTIGATION

Indio Police Detective Peter Fuentes was called to the hospital where the victim was taken. The victim died at the hospital from multiple gunshot wounds to his torso, buttocks, right arm, and left arm.

Detective Fuentes spoke with Soto and Meza at the hospital around 2:30 a.m. Soto told him they should be looking for a Hispanic man with a green and black racing-

style motorcycle. He recommended that Detective Fuentes speak with the victim's family and they would know the person on the motorcycle.[6] The victim was close friends with the person on the motorcycle but Soto refused to give Detective Fuentes his name. Soto never told Detective Fuentes that defendant had been in the house.

Meza did not tell officers at the hospital that defendant was at the house and on a motorcycle that night because he was scared. He initially lied to officers. He told officers at the hospital that the victim went outside five minutes before he was shot but that was a lie. On May 27, 2016, after the victim died, Meza told detectives defendant was present at the house the night of the shooting.

Detective Fuentes also spoke with Sanchez. Sanchez told Detective Fuentes and Gomez that she saw a black, racing-style motorcycle in the driveway and she heard a motorcycle after the shooting. She also stated she saw a gun on the grass.

Ashleigh spoke with Detective Fuentes the day after the shooting. She told Detective Fuentes that she saw a "guy" on a green motorcycle. She also told Detective Fuentes that she knew defendant through her little brother. She was told by Soto that defendant was at the house in the bedroom with the victim that night. Ashleigh told Detective Fuentes she never saw defendant at the house.

The victim's mother, sister and brother told Detective Fuentes at the hospital that one of the victim's friend's, defendant, had either a green, or black and green motorcycle. Defendant was like a brother to the victim.

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[6] At trial, Soto did not recall telling an officer that he should talk to the victim's mother.

Indio Police Lieutenant Doug Haynes spoke with Ali the morning after the shooting. Ali told him the rider had no helmet on, was 40 to 50 years old and had long hair pulled back. Marx was unable to give a description. On May 30, 2016, Ali and Marx could not identify the person on the motorcycle from the six-pack photographic lineup, which consisted of Hispanic males, including defendant.

Defendant was apprehended in a car driven by his girlfriend on May 30, 2016. The vehicle was searched. Hidden in a panel on the passenger's side of the vehicle where defendant had been sitting was a key to a Kawasaki motorcycle and a .38-caliber gun. The gun was not registered to defendant.

Video surveillance from neighbors near the time of the shooting was obtained. A motorcycle was seen in the surveillance around the time of the shooting. Also video surveillance was obtained from a school by defendant's apartment complex, which showed a motorcycle traveling down the road between 12:30 and 1:00 a.m.

On April 16, 2016, a green and black Kawasaki motorcycle was seen parked near defendant's apartment but defendant was not confirmed as the owner of the motorcycle.

Shell casings found at Meza's house were from a .45-caliber gun. The casings were all found close to each other showing the shooter stayed in the same place. No other caliber of expended casings was found. The victim's DNA was found on the .38-caliber gun that was on the lawn at Meza's house. The gun was operable. No DNA or fingerprints were found on any other items tested. The gun found in defendant's possession when he was arrested would not have matched the shell casings found on the

lawn. After May 27, 2016, defendant was not found in possession of a green and black motorcycle.

DISCUSSION

A. ADMISSION OF SOTO'S PRIOR IDENTIFICATION

Defendant insists the trial court erred and violated his federal Constitutional due process rights by admitting testimony by Ashleigh—that Soto had told her on the night of the shooting that defendant was present at the home—to attack Soto's credibility.

1. *ADDITIONAL FACTUAL HISTORY*

During trial, prior to the testimony of Ashleigh, the prosecutor sought a ruling on the admissibility of her testimony that Soto, on the night of the shooting, kept going into a bedroom in the house and would come back and advise her and the others that defendant was in the bedroom. Ashleigh told this information to Detective Fuentes and another detective when she was interviewed shortly after the victim's murder. During Soto's preliminary hearing testimony, he denied that defendant was at the house. The prosecutor argued Ashleigh's testimony would impeach Soto's credibility. The prosecutor was not seeking to admit the statement for its truth. The prosecutor relied on Evidence Code section 1202 and acknowledged that a limiting instruction pursuant to CALCRIM No. 319 would need to be given.

Defense counsel responded that Ashleigh's testimony should be excluded as more prejudicial than probative pursuant to Evidence Code section 352. The issue in the case was identification and it would be impossible for the jurors to simply consider the evidence for impeachment purposes rather than to the issue in the case of identification.

The prosecutor responded that Soto's statement was not more prejudicial than probative. It was admissible to show Soto was not credible and it did not identify defendant as the shooter; it only showed defendant was present. The prosecutor noted that Meza was going to testify that defendant was present and defense counsel likely was going to attack Meza's credibility; the People were entitled to attack Soto's credibility.

The trial court found the statement admissible under Evidence Code section 1202. As for Evidence Code section 352, it ruled "I do have some concern that the jury will confuse the purpose that that statement is being allowed in. But it does appear, given the issues here in this case, that that would be more probative than prejudicial, even though, I mean, it's very close here. But given the way that this has panned out, I'm going to go ahead and allow it." Defense counsel asked that CALCRIM No. 319 include that the evidence could not be used for identification.

When Ashleigh testified, she was asked by the prosecutor if she was told that defendant was at the house that night. Defense counsel objected on hearsay grounds. The prosecutor responded it was not being offered for its truth and only for the credibility of Soto. At that point, the trial court admonished the jurors, "Daniel Soto did not testify in this trial, but his testimony taken at another time was read for you. In addition to this testimony, you have heard evidence that Daniel Soto made another statement. I am referring to the statement about which Ashleigh Smith testified. If you conclude that Daniel Soto made the other statement, you may only consider it in a limited way. You may only use it in deciding whether to believe the testimony of Daniel Soto that was read here at trial. You may not use that other statement as proof that the information

contained in it is true, nor may you use it for any other reason, including identity of the perpetrator." Ashleigh then testified that Soto told her defendant and the victim were in the back bedroom on the night of the shooting.

When Detective Fuentes testified about his interview with Ashleigh, he testified that Soto had told Ashleigh that defendant was present at the house. The trial court gave the same limiting instruction it had given when Ashleigh testified. At the time the trial court gave the instructions to the jury, it again gave CALCRIM No. 319.

2. *ADMISSIBLITY OF THE EVIDENCE*

Evidence Code section 1202 provides that "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant." Admission of a prior inconsistent statement under Evidence Code section 1202 is for the limited purpose of impeachment and not for the truth of the matter. (*People v. Blacksher* (2011) 52 Cal.4th 769, 806.)

Defendant appears to concede that the evidence was admissible under Evidence Code section 1202. Nonetheless, defendant insists the trial court erred by admitting the evidence as it was more prejudicial than probative under Evidence Code section 352.

"Under Evidence Code section 352, a trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. 'Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." ' " (*People v. Riggs* (2008) 44 Cal.4th 248, 289-290.) "When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers 'substantially outweigh' probative value, the objection must be overruled." (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

"A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Here, the trial court did not abuse its discretion by allowing Ashleigh and Detective Fuentes to testify Soto had told Ashleigh that defendant was in the bedroom with the victim on the night of the shooting. Soto denied in his preliminary hearing testimony that he saw defendant at the house the night of the shooting. He testified only Meza and the victim were in the bedroom together that night. Ashleigh testified that after Soto went to Meza's bedroom, Soto came back and told them that defendant was in the bedroom. This evidence was admissible to attack Soto's credibility. As noted by the

prosecutor, defense counsel would seek to attack Meza's credibility. The evidence was clearly probative for the purpose of impeaching Soto's credibility.

Further, the evidence was not more prejudicial than probative. The fact Soto told Ashleigh that defendant was present in Meza's bedroom did not confirm that defendant was the shooter as no one witnessed the shooting. Further, it did not result in an undue consumption of time because it was just a brief statement brought out through Ashleigh's testimony and confirmed by Detective Fuentes.

Additionally, as noted, the jury was instructed on numerous occasions that it could not use the evidence for the truth of the matter that defendant was present and was the shooter. The jury was specifically instructed "You may not use that other statement as proof that the information contained in it is true, nor may you use it for any other reason, including identity of the perpetrator." We presume the jurors followed the instructions and did not consider the evidence as identification evidence but for the proper purpose of impeachment. (*People v. Wilson* (2008) 44 Cal.4th 758, 803 ["We of course presume 'that jurors understand and follow the court's instructions' "].) As such, the trial court did not abuse its discretion by admitting Ashleigh's testimony.

Defendant relies on *People v. Ross* (1979) 92 Cal.App.3d 391 (*Ross*). In *Ross*, defendants Ross and Atkins entered the apartment of the 90-year-old-victim, killing the victim and setting the apartment on fire. They were charged with murder, robbery, burglary and arson, with a penalty enhancement that the murder was committed by means of torture with an intent to kill. (*Ross, supra*, 92 Cal.App.3d at p. 397-398.) At trial, Ross's postarrest statement was admitted into evidence wherein he admitted he

committed burglary and robbery but denied being involved in the murder or arson; Atkins had beaten the victim and started the fire. Ross did not testify but called Atkins's roommate to testify that Atkins had confessed his guilt to him and did not mention another participant, to show Ross was not involved in the murder and arson. (*Id.* at p. 399.) On rebuttal, the prosecutor introduced, pursuant to Evidence Code section 1202, two in-custody statements Atkins had made in which he admitted his guilt to the burglary and robbery, denied he was involved in the arson and murder implicitly blaming Ross for these actions, and denied that he confessed to his roommate. (*Ross*, at p. 399.)

On appeal, the appellate court agreed that the two in-custody statements by Atkins were admissible pursuant to Evidence Code section 1202. However, it found the testimony should have been excluded pursuant to Evidence Code section 352 because of the substantial danger of prejudice and confusion of the jury but provided no further elaboration. (*Ross*, *supra*, 92 Cal.App.3d at p. 407.) The appellate court found that the error was compounded by argument from the prosecutor that Atkins's in-custody statements were true statements. It concluded the failure to exclude the evidence was an abuse of discretion. (*Ibid*.)

This case differs from *Ross*. Here, the jury was repeatedly admonished it could not consider Ashleigh's statement for its truth and the prosecutor did not argue that her statement should be considered for its truth. Moreover, this evidence did not identify defendant as the shooter, which differs from the testimony of a codefendant trying to exonerate himself. The testimony by Ashleigh was properly admitted and was not more prejudicial than probative.

3. *HARMLESS ERROR*

Defendant contends the admission of the evidence violated his right to due process and must be reviewed for prejudice pursuant to the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. However, "We [normally] review evidentiary errors for prejudice by determining whether it was reasonably probable that a jury would have returned a more favorable verdict for defendant had the court not admitted the evidence." (*People v. Felix* (2019) 41 Cal.App.5th 177, 187; see also *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Admission of Soto's statement did not render defendant's trial so fundamentally unfair as to constitute a due process violation. "To prove a deprivation of federal due process rights, [a defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose' [Citation.] 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process.' " (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230.) Here, the evidence was relevant to Soto's credibility, a permissible inference from the evidence, and it was not of such quality that it impeded defendant's right to a fair trial. As such, we review prejudice under *Watson*, e.g. the evidentiary error is harmless unless it is reasonably probable defendant would have

received a more favorable result absent the error or errors. (*People v. Felix, supra,* 41 Cal.App.5th at p. 187.)

Even if the jury did consider that defendant was present by relying on Ashleigh's statement, other credible evidence supported that defendant was the shooter. Initially, even if the jury considered Soto's testimony, it only identified defendant as being present in the house and not as the shooter. This same evidence was provided by Meza who testified that defendant was present with the victim in the room prior to the shooting. Circumstantial evidence supported that defendant was the shooter. Defendant was in possession of a handgun that would shoot .45-caliber bullets just prior to the shooting and all of the shell casings found on the lawn after the shooting were .45-caliber. Meza observed defendant leaving on his motorcycle after the shooting and he did not stop to help the victim despite them being best friends. Several of the girls saw a motorcycle in the driveway when they arrived at Meza's house. Wilford heard a motorcycle driving from the house after the shooting. Both Ali and Marx indicated that after the shooting, the shooter left on a motorcycle. Although their descriptions of the person on the motorcycle and the type of motorcycle were different from Meza and the girls, it confirmed that the shooter was riding a motorcycle that night, corroborating Meza's testimony. Finally, video surveillance showed a motorcycle near the scene of the shooting and near defendant's apartment complex around the time of the shooting. Defendant had been seen during the day of the shooting riding a green and black motorcycle.

Based on the foregoing, even if the jury considered that Ashleigh's statement identified defendant as being present at the house that night, it is not reasonably probable that defendant would have received a favorable verdict had the statement been excluded as other credible evidence supported defendant's conviction.

B. INCONSISTENT INSTRUCTIONS ON SOTO'S TESTIMONY

Defendant further contends the trial court erred and violated his federal Constitutional due process rights by giving conflicting instructions on the limited purpose of Soto's prior statement that he saw defendant at the house. He insists that despite the jury being instructed three times as to the limited purpose for which it could use Soto's statement pursuant to CALCRIM No. 319, they also were instructed with CALCRIM Nos. 317 and 318, which conflicted with CALCRIM No. 319.

1. *ADDITIONAL FACTUAL HISTORY*

The jury was instructed with CALCRIM No. 317 that "The testimony of Daniel Soto, as given under oath, was read to you because he is not available. You must evaluate this testimony by the same standards that you apply to a witness who testified here in court." They were also instructed with CALCRIM No. 318 that "You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: [¶] 1. To evaluate whether the witness's testimony in court is believable; and, [¶] 2. As evidence that the information in those earlier statements is true."

Prior to the trial court giving CALCRIM No. 319, the jury was instructed "During the trial, certain evidence was admitted for a limited purpose. You may consider that

evidence only for that purpose and no other." The trial court also gave the limiting instruction pursuant to CALCRIM No. 319 for the third time when giving all the instructions. They were again advised, "Daniel Soto did not testify in this trial, but his testimony, taken at another time, was read for you. In addition to this testimony, you have heard evidence that Daniel Soto made another statement. I am referring to the statement about which Ashleigh Smith testified regarding Daniel Soto telling her that [defendant] was in the back bedroom with [the victim]. [¶] If you conclude that Daniel Soto made that other statement, you may only consider it in a limited way. You may only use it in deciding whether to believe the testimony of Daniel Soto that was read here at trial. You may not use the other statement as proof that the information contained in it is true, nor may use it for any other reason, including identity of the perpetrator." Both the prosecutor and defense counsel requested these instructions.

2. *ANALYSIS*

Initially, the People contend that defendant forfeited this claim by agreeing to the instructions below and failing to request clarification of the instructions. Anticipating such a claim, defendant contended in his opening brief that the erroneous instructions affected his substantial rights, forgiving the failure to object; or in the alternative, if he is found to have forfeited the claim, he received ineffective assistance of counsel. It is true that defendant's counsel requested that the three instructions be given, and did not request any modifications. However, in order to foreclose a lengthy discussion on forfeiture and ineffective assistance of counsel, we will address the merits.

"In reviewing the purportedly erroneous instructions, 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' " (*People v. Frye* (1998) 18 Cal.4th 894, 957, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) "When reviewing ambiguous instructions, we inquire whether the jury was 'reasonably likely' to have construed them in a manner that violates the defendant's rights." (*People v. Rogers* (2006) 39 Cal.4th 826, 873.)

In this particular case, the jury could reasonably interpret CALCRIM No. 317, which instructed that Soto's testimony was read to the jury because he was unavailable at trial but such testimony should be evaluated under the same standards as testimony given in trial, only applied to Soto's preliminary hearing testimony, and that CALCRIM No. 319 only applied to his statement to Ashleigh. The prosecutor made this clear during opening argument. The prosecutor stated, as to Ashleigh's statement, "What are you allowed to do with that information? Right? Well, CALCRIM 319 tells us you can use this statement to assess the credibility of Daniel Soto's testimony that was read to you. So when it was read to you and Daniel Soto says [defendant] wasn't there, you're allowed to use this piece of information that Ashleigh says, 'Hey, that very night Daniel said he was back there in that back room with [the victim].' You're allowed to use that to determine whether or not Daniel Soto was telling the truth when he testified." The court can assume that "counsel's arguments clarified an ambiguous jury charge." (*Middleton v. McNeil* (2004) 541 U.S. 433, 438.)

The jury was properly instructed on how to view Soto's preliminary hearing testimony and it did not conflict with CALCRIM No. 319. There was no apparent constitutional violation in the giving of CALCRIM Nos. 317 and 319 based on the particular facts of this case.

As for CALCRIM No. 318, it advised the jurors that in evaluating statements made prior to trial that were admitted, it could use those statements in two ways: "1. To evaluate whether the witness's testimony in court is believable; and, [¶] 2. As evidence that the information in those earlier statements is true." Here, the first use, evaluating whether the witness was credible, was the same as CALCRIM No. 319.

As for the second use, that the earlier statements could be considered for their truth, could be considered to conflict with CALCRIM No. 319, which specifically advised the jury it could only use Soto's statement prior to trial that defendant was in Meza's bedroom to impeach Soto's credibility. Even if there was ambiguity, "the question is whether there is a ' "reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' " (*People v. Mills* (2012) 55 Cal.4th 663, 677.) In order for the jury to have considered CALCRIM No. 318 applied to Soto's statement to Ashleigh, it would have had to ignore the directive of CALCRIM No. 319 that was given three times, two of which were given at the same time as the testimony. Further, it would have to ignore that it was instructed that some evidence was admitted for a limited purpose and could only be considered for that purpose, which was given just prior to CALCRIM No. 319. It is inconceivable the jurors

ignored the directive of CALCRIM No. 319, which was given in conjunction with the testimony and relied on the pattern CALCRIM No. 318 instruction in its place.

Here, the jury would have had to conclude that CALCRIM No. 319 was superfluous and ignore its explicit directive, given three times to the jury, that Soto's statement could only be considered to impeach his credibility. There is no reasonable likelihood that the jury considered Soto's statement to Ashleigh for its truth based on the instructions. (*People v. Frye*, *supra*, 18 Cal.4th at p. 957.) There was no constitutional violation based on the instructions given in this case.

C. CALCRIM NO. 315—CERTAINTY IN IDENTIFICATION

Defendant insists that the standard CALCRIM No. 315 instruction on eyewitness identification violated his state and federal due process rights because it advised the jurors that an eyewitness's certainty in identifying a defendant is a factor the jury can consider in evaluating truthfulness and accuracy of the eyewitness's testimony.

The jury here was instructed with CALCRIM No. 315 about eyewitness identification. That instruction stated, "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: . . ." One of these questions was, "How certain was the witness when he or she made an identification?" The instruction was requested by both parties.

Initially, the People contend that defendant forfeited his claim by failing to request that the trial court modify CALCRIM No. 315. Anticipating that the People would argue that he forfeited the claim, defendant claims he received ineffective assistance of counsel

due to his counsel's failure to request a modification of the instructions. We will address the merits as this court is bound by the California Supreme Court case of *People v. Sanchez* (2016) 63 Cal.4th 411, 462 (*Sanchez*).

Defendant recognizes that the California Supreme Court has approved of the language in CALCRIM No. 315 in *Sanchez*, *supra*, and that we are bound by its precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[7] The California Supreme Court has granted review in *People v. Lemcke* (June 21, 2018, G054241) [nonpub. opn.], review granted October 10, 2018, S25018 to provide further guidance on whether the language of CALCRIM No. 315 violates due process. Until *Sanchez* is overruled or otherwise modified by the California Supreme Court, we are bound by *Sanchez* and find that the instruction given was not erroneous.

Additionally, inclusion of the certainty language in CALCRIM No. 315 did not prejudice defendant as it is not reasonably probable that he would have received a more favorable result had the instruction excluded the certainty factor. (*Sanchez*, *supra*, 63 Cal.4th at pp. 462-463.) Initially, as in *Sanchez*, the challenged instruction was presented in a neutral manner and did not equate the certainty of the witness's identification with its accuracy. (*Id.* at p. 462.)

[7] In *Sanchez*, the court reviewed the predecessor to CALCRIM No. 315, which was CALJIC No. 2.92, but it contained the same or similar language. (*Sanchez*, *supra*, 63 Cal.4th at pp. 461-462.)

Further, Meza, who testified that defendant was at the house before the shooting, knew defendant personally. As such, there was no question that if he saw defendant at the house, he knew it was defendant.

Moreover, Meza did not identify defendant as the shooter as he did not see defendant shoot the victim. As previously stated, circumstantial evidence supported that defendant was the shooter. Defendant was in possession of a handgun, which used the same type of bullets that matched the shell casings found after the shooting; defendant was seen by Meza leaving on his motorcycle after the shooting; and numerous other witnesses stated that a motorcycle was at Meza's house and left after the shooting. Based on the foregoing, the instruction with CALCRIM No. 315 did not prejudice defendant.

D. CUMULATIVE ERROR

Defendant contends that considered together, these evidentiary and instructional errors denied him a fair trial. Under the cumulative error doctrine, the cumulative effect of several trial errors may be prejudicial even if they would not be prejudicial when considered individually. (See *People v. Sanchez* (1995) 12 Cal.4th 1, 60, overruled in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 380, 421.) Here we have found no trial error occurred and any conceivable errors to be harmless, and as a result, collectively they were not prejudicial. (See *People v Lua* (2017) 10 Cal.App.5th 1004, 1019.) Defendant has failed to show cumulative errors warrant reversal.

E. SENTENCING—REDUCE TO LESSER FIREARM ENHANCEMENT

Defendant contends that remand is necessary because the trial court did not understand it had the discretion to impose a lesser firearm enhancement under the

authority of section 12022.53, subdivision (h). The trial court refused to strike the section 12022.53, subdivision (d), enhancement found true by the jury, which required a mandatory 25-years-to-life sentence, but defendant contends it could have imposed the lesser weapons-use enhancements under section 12022.53, subdivision (b), or (c), which would have resulted in a lesser sentence.

1. *ADDITIONAL FACTUAL HISTORY*

The jury found true the allegation that defendant had personally used a firearm causing great bodily injury or death pursuant to section 12022.53, subdivision (d). The People argued in their sentencing memorandum that the trial court should not strike that weapons use enhancement under section 12022.53, subdivision (h). The People cited the aggravating factors including that the crime involved great violence, defendant was armed with a firearm, defendant occupied a position of trust with the victim, his actions showed planning and sophistication, and he was a danger to society. There were no mitigating factors. A sentence of 40 years to life was appropriate.

Defendant filed his request that the trial court dismiss the gun enhancement that was found true pursuant to section 12022.53, subdivision (d). Such dismissal was warranted based on his young age (he was 18 years old at the time of the crime), his immaturity, and his lack of an extensive record. Defendant's counsel did not request that a lesser gun enhancement be imposed.

At the hearing, the trial court stated it had a long conference with both counsel off the record because the case was very "troubling and difficult." The trial court was "troubled" by its only "two options." The prosecutor noted that the appropriate sentence

was 40 years to life but that if defendant could perform well in prison, he may be able to be released early as a youthful offender. Defense counsel noted that the court only had the choice of 15 years to life or 40 years to life based on whether it struck the weapons use enhancement.

The trial court reviewed the factors that defendant was 18 years of age at the time of the crime and that the victim who was shot was his best friend. Further, the victim was shot in the back and defendant had multiple incidents in which he was in possession of a gun. Defendant fled the scene leaving the victim to die. The trial court was troubled by the fact that defendant appeared to have easy access to guns. The trial court found, "But given the callous nature, the severity of the crime, the fact that the victim was shot multiple times, his easy access to weapons, the fact that he is familiar and appears to be using weapons on multiple occasions, counsel, I don't believe it's in the interest of justice to strike the gun enhancement."

2. *ANALYSIS*

Section 12022.53, subdivision (d), provides that "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

In 2017, the Legislature enacted Senate Bill No. 620 (Stats. 2017, ch. 682 § 2, pp. 5104-5106, eff. Jan. 1, 2018) which amended section 12022.53. In particular, it added

section 12022.53, subdivision (h), which provides "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

This court in *People v. Yanez* (2020) 44 Cal.App.5th 452, review granted on April 22, 2020, S260819 (*Yanez*), found that section 12022.53, subdivision (h), and section 1385 did not give the trial court the discretion to impose a lesser weapons-use enhancement. (*Id.* at pp. 459-460.) This court recently again approved of the finding in *Yanez*, that section 12022.53, subdivision (h), does not give the trial court authority to impose a lesser enhancement. (*People v. Valles* (2020) 49 Cal.App.5th 156, 679-682.) In *Valles*, this court concluded, "The express language of sections 1385 and 12022.53, subdivision (h) refers only to dismissing (or striking) actions or enhancements; neither section authorizes the substitution of a lesser enhancement for a greater enhancement, properly found true at trial, and for which there is no legal impediment to imposition. It does not give the court the right to disregard the verdict of a jury and pronounce a sentence that does not respond to the verdict as rendered." (*Valles*, at p. 681.)

We follow the reasoning in both *Yanez* and *Valles* and find the trial court under section 12022.53, subdivision (h), and 1385 had the discretion only to dismiss the weapons use enhancement found true under section 12022.53, subdivision (d). The trial court properly determined that it should not strike the enhancement. Remand for resentencing is unnecessary.

F. ABILITY-TO-PAY HEARING

Defendant claims, relying on *Dueñas, supra,* 30 Cal.App.5th 1157, that the trial court violated his federal constitutional right to due process by failing to determine his ability to pay the imposed restitution fines and court fees. Defendant contends remand is necessary in order for the trial court to conduct an ability to pay hearing. The California Supreme Court will ultimately decide this issue as it has granted review in *People v. Kopp*, review granted on November 13, 2019, S257844, but we conclude remand is not necessary.

Defendant was sentenced on December 5, 2018, prior to *Dueñas* being decided. The trial court imposed the court operations fees pursuant to Penal Code section 1465.8 in the total amount of $40. It further imposed a criminal conviction assessment fee in the amount of $30 pursuant to Government Code section 70373. The trial court then asked the parties if the minimum restitution fine was $1,000 and defense counsel agreed that the minimum restitution fine was $1,000. The trial court then imposed a $1,000 restitution fine pursuant to Penal Code section 1202.4, subdivision (b), and a stayed parole revocation fine in the amount of $1,000 pursuant to Penal Code section 1202.45. The trial court also imposed a victim restitution fine payable to the victim's mother in the amount of $1,340.61 and at least $7,500 payable to the California Victim Compensation Board pursuant to Penal Code section 1202.4, subdivision (f)(2), with the amount to be determined. There was no objection by defense counsel and the trial court did not address defendant's ability to pay. Defendant was admonished he was entitled to a

hearing if he disputed the restitution amount imposed under Penal Code section 1202.4, subdivision (f).

Initially, as raised by defendant and conceded by the People, the trial court erroneously imposed the restitution fine in the amount $1,000. It was clear the trial court wanted to impose the minimum amount, which is $300. (§ 1202.4, subd. (b)(1).) As such, we will order that the restitution fine imposed pursuant to section 1202.4, subdivision (b)(1), and the parole revocation fine imposed and stayed in the same amount, be reduced to $300.

Both Government Code section 70373, subdivision (a)(1), and Penal Code section 1465.8, subd. (a)(1), do not include language regarding the defendant's ability to pay the fees. Penal Code section 1202.4, subdivision (b), provides for a mandatory minimum restitution fine in the amount of $300 absent "compelling and extraordinary reasons for not doing so." If the trial court wishes to exceed $300, only then must if determine if the defendant has the ability to pay the additional fine. (§ 1202.4, subd. (d).)

On January 8, 2019, after sentencing in this case, the Court of Appeal issued its opinion in *Dueñas, supra*, 30 Cal.App.5th 1157. In *Dueñas*, the defendant was a probationer who suffered from cerebral palsy, was indigent, homeless, and the mother of young children. She requested and received a full hearing on her ability to pay the court facilities fee, court operations fee, and the mandatory minimum restitution fine. Despite her clear inability to pay these fees and fine, the trial court mandatorily imposed them. (*Id.* at pp. 1162-1163.)

The appellate court held that the trial court violated the defendant's right to due process under both the United States and California Constitutions by imposing court operations and facilities assessments pursuant to Government Code section 70373 and Penal Code section 1465.8, without making a determination as to the defendant's ability to pay even though such determination was not required by the statute. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1168.) Further, the court concluded that although the imposition of restitution fines pursuant to section Penal Code section 1202.4, subdivision (b), is punishment unlike the above fees, it raises similar constitutional concerns, and therefore, the *Duenas* court held that while the trial court must impose the minimum restitution fine even if the defendant demonstrates an inability to pay, "the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas*, at p. 1172.)

Initially, defendant insists that *Dueñas* applies to the fine imposed pursuant to section 1202.4, subdivision (f), for the victim's mother in the amount of $1,340.61. The *Dueñas* court did not address direct victim restitution. "The purpose of direct victim restitution, . . . , is to reimburse the victim for economic losses caused by the defendant's criminal conduct, i.e., to make the victim reasonably whole." (*People v. Holman* (2013) 214 Cal.App.4th 1438, 1451-1452.) Another court has concluded that "based on the significant differences in purpose and effect between victim restitution and the moneys at issue in *Dueñas*, we decline to extend the rule of *Dueñas* to victim restitution. . . . . We conclude . . . that a defendant's ability to pay victim restitution is not a proper factor to consider in setting a restitution award under section 1202.4, subdivision (f)." (*People v.*

Evans (2019) 39 Cal.App.5th 771, 777.)[8] We agree with the reasoning in *Evans* and find that there was no due process violation shown by defendant in imposing the direct victim restitution fine.

As to the restitution fine imposed pursuant to section 1202.4, subdivision (b), we need not determine if it is properly analyzed under the excessive fines clause of the Eighth Amendment as argued by the People or whether *Dueñas* was properly decided as to the fees imposed. Even if *Dueñas* applies to this case, the record supports defendant has the ability to pay based on his prison wages, rendering any conceivable constitutional error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1033 [defendant has ability to pay assessments and fines through prison wages].) Defendant, who has received a sentence of 40 years to life, can earn wages in prison to pay the restitution fines (including the $1,340.61 victim restitution fine) and the fees imposed. We find that even if *Dueñas* was properly decided, any conceivable constitutional error was harmless.

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[8] Defendant does not specifically address the $7,500 award to the California Victim Compensation Board. That amount was to be determined. As explained in *People v. Holman*, *supra*, 214 Cal.App.4th 1438, "[t]he Restitution Fund is in the State Treasury Department, and is used to compensate victims for certain kinds of 'pecuniary losses they suffer as a direct result of criminal acts.' (Gov. Code, § 13950, subd. (a).) Crime victims may apply to the Restitution Fund as one avenue to recover monetary losses caused by criminal conduct." (*Id.* at p. 1452.) Then, "when direct victim restitution has been satisfied by the victim's application to the victim compensation program, the amounts a defendant is ordered to pay as direct victim restitution are instead paid to the Restitution Fund." (*Id.* at p. 1452.) At this point, the only amount of direct victim restitution that has been determined is the payment to the victim's mother.

G. ABSTRACT OF JUDGMENT

We do note that the abstract of judgment in this case improperly states that the count 1 was to run "concurrent" to the 25-years-to-life sentence on the section 12022.53, subdivision (d), enhancement. However, the trial court imposed a sentence of 15 to life for count 1 and a consecutive 25 years to life for the gun enhancement pursuant to section 12022.53 for a total of 40 years to life. We will order that the abstract of judgment be corrected.

DISPOSITION

The trial court is directed to correct the abstract of judgment to reduce the $1,000 restitution fine imposed pursuant to section 1202.4, subdivision (b) to $300; and reduce the parole revocation fine imposed pursuant to section 1202.45 to $300 and stay that amount. In addition, the abstract of judgment shall be corrected to reflect that count 1 is to run consecutive to the sentence on the section 12022.53, subdivision (d), enhancement. The trial court is further directed to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
Acting P. J.

We concur:

CODRINGTON
J.

FIELDS
J.